

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 LINDA FRANZ,

4
5 Petitioner,

6 v.

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8 WHATCOM COUNTY COUNCIL
9 WHATCOM COUNTY EXECUTIVE,

10 Respondents,

11 And,

12 JAMES F. CARR,

13 Intervenor.
14

CASE NO. 05-2-0011

**FINAL DECISION AND
ORDER**

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16 This matter comes before the Board through a Petition for Review filed on March 25, 2005,
17 by Ferndale area resident Linda Franz. The petition challenges Whatcom County's
18 adoption of Ordinance AB2004-082A amending Respondent County's Comprehensive Plan
19 and zoning maps, creating a Mineral Resource Lands designation near Ferndale. Petitioner
20 also challenges adoption of Ordinance AB2004-400, which amends the County's
21 Comprehensive Plan, Chapter 8, Mineral Resource Lands. Both these measures were
22 adopted on January 25, 2005, as part of Respondent County's comprehensive plan
23 enactments under terms of the Growth Management Act. Additionally, the Petitioner alleges
24 an absence of due process in the County's Determination of Non-significance under terms
25 of the State Environmental Policy Act (SEPA).
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28 Petitioner represented herself throughout the adjudication of this case. Karen Frakes, Civil
29 Deputy Prosecutor, represented the Whatcom County Executive and Whatcom County
30 Council. Lesa Starkenburg-Kroontje, attorney, represented Intervenor James Carr, owner of
31 a sand and gravel pit that is a significant part of the subject designated land in this matter.
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1 Following the Hearing on the Merits the Board reviewed the oral and written record,
2 deliberated, and came to a final decision. (See Procedural History).

3 4 **SYNOPSIS**

5 In the State of Washington balancing the obligation to conserve a diminishing non-
6 renewable resource against the concerns of neighboring rural residents impacted by surface
7 mining operations will be a difficult issue until the resource no longer exists. Whatcom and
8 other counties faced this confounding situation in the 1990s. Appeals of county actions and
9 determinations were carried to both the Western and Eastern Washington Growth
10 Management Hearings Boards. The directives and values expressed in the Growth
11 Management Act (GMA) regarding mineral resource lands and residential-classified rural
12 lands rose again in 2004 and 2005 in this Whatcom County conflict over additional mineral
13 resources lands designation activity. Two citations from a WWGMHB decision in Case 97-
14 2-0030c, *Wells v. Whatcom County* are both instructive and applicable here:
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17 The Board finds no flaw with the County's public participation efforts. Petitioner
18 Wells argued that the County's process did not comply with the GMA because the
19 County did not *listen* to all the citizens who participated. A more accurate
20 characterization is that the County did not *agree* with positions urged by some of the
21 citizens who participated. The County complied with the Act's public participation
22 requirements.

23 Final Decision and Order – January 16, 1998.

24 Policy 8P-4 directs County staff to allow mining within designated MRLs through the
25 permitting process. It does not require staff to permit (mining) in all circumstances.
26 We hold that the primary purpose of Policy 8P-4 is to conserve mineral lands rather
27 than, as WRW concludes, that the primary purpose is to resolve land use
28 compatibility conflict issues. Specific conflicts are appropriately addressed in a site-
29 by-site permitting and review process.

30 Order on Motion for Reconsideration – February 17, 1998.

31 Petitioner timely brought a challenge of two ordinances regarding mineral resource lands
32 designation adopted by Whatcom County as amendments to its Comprehensive Plan and
Zoning Map: Ordinance 2005-003, Mineral Resource Designation for the North Star

1 Property and 2005-024, amendments to the comprehensive plan's resource policies. For
2 authority in her challenge, Petitioner largely cited provisions of the GMA and the
3 Washington Administrative Code (WAC). She additionally included citations to selected
4 goals, policies, and designation criteria in Chapter 8 - Resource Lands of the County's
5 Comprehensive Plan and addressed what appeared to her to be shortcomings in the use of
6 the State Environmental Policy Act at the local level. While she offered views and opinions
7 on the substance and the process of the County's consideration and adoption of these
8 ordinances, the Board determines Petitioner did not complete the process of critique and/or
9 advocacy for conditioning any actual mining operation contemplated by Intervenor Carr near
10 her Ferndale-area rural residential home. To accomplish that effectively, she must
11 participate in the review and comment during a county administrative permit process that
12 will likely be requested by the Intervenor.
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16 The County's mineral resource lands (MRLs) designation effort, their review and
17 modification of criteria from the 1997 Comprehensive Plan, and their use of the SEPA
18 process to arrive at a Declaration of Nonsignificance at the designation stage, was
19 exercised within the arena of both state mandates and local options under the GMA and
20 was not clearly erroneous. Especially given the diversity of needs and views on community
21 preservation, economic development, and stewardship of mineral resource lands the County
22 faces, the two subject ordinances were properly adopted and are compliant with the GMA.
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25 **BURDEN OF PROOF**

26 For purposes of board review of the comprehensive plans and development regulations
27 adopted by local governments, the GMA establishes three major precepts: a presumption of
28 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
29 decisions of local government.
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1 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations, and
2 amendments to them are presumed valid upon adoption:

3 Except as provided in subsection (5) of this section, comprehensive plans and
4 development regulations, and amendments thereto, adopted under this chapter are
5 presumed valid upon adoption.
6 RCW 36.70A.320(1).

7 The statute further provides that the standard of review shall be whether the challenged
8 enactments are clearly erroneous:

9 The board shall find compliance unless it determines that the action by the state
10 agency, county, or city is clearly erroneous in view of the entire record before the
11 board and in light of the goals and requirements of this chapter.
12 RCW 36.70A.320(3).

13 In order to find Whatcom County's action clearly erroneous, the Board must be "left with the
14 firm and definite conviction that a mistake has been made." *Department of Ecology v.*
15 *PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

16 Within the framework of state goals and requirements, the boards must grant deference to
17 local governments in how they plan for growth and development:

18 In recognition of the broad range of discretion that may be exercised by counties and
19 cities in how they plan for growth, consistent with the requirements and goals of this
20 chapter, the legislature intends for the boards to grant deference to the counties and
21 cities in how they plan for growth, consistent with the requirements and goals of this
22 chapter. Local comprehensive plans and development regulations require counties
23 and cities to balance priorities and options for action in full consideration of local
24 circumstances. The legislature finds that while this chapter requires local planning to
25 take place within a framework of state goals and requirements, the ultimate burden
26 and responsibility for planning, harmonizing the planning goals of this chapter, and
27 implementing a county's or city's future rests with that community.
28 RCW 36.70A.320(1) (in part).

29 In sum, the burden is on the Petitioner to overcome the presumption of validity and
30 demonstrate that any action taken by the County is clearly erroneous in light of the goals
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1 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
2 Where not clearly erroneous, and thus within the framework of state goals and
3 requirements, the planning choices of local governments must be granted deference.
4

5 **PROCEDURAL HISTORY**

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7 On March 25, 2005, Linda Franz, a resident of a rural neighborhood near Ferndale, filed a
8 Petition for Review of two Whatcom County ordinances adopted January 25, 2005, and a
9 SEPA determination that resulted in a Declaration of Nonsignificance (DNS) in May of 2004.
10 An ordinance updating the mineral resources section of the Comprehensive Plan, and
11 adding designation criteria, is numbered 2005-024. The other challenged ordinance is the
12 MRL designation of the North Star property and is numbered 2005-003. The numbers on
13 county ordinances are incorrectly stated in the issues statement in earlier documents. They
14 are corrected in succeeding briefs and in the final decision and order.
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17 A prehearing conference was held on April 22, 2005. At that time Petitioner indicated she
18 would restate some of her issues since the original issues statement contained some items
19 over which the Growth Boards have no jurisdiction. Mr. James F. Carr, owner of property
20 historically mined at North Star Road and the proponent of Ordinance 2005-003, was
21 admitted by the Presiding Officer as Intervenor in this case. A second prehearing order was
22 issued on May 18, 2005. Voluminous documents were filed at the Board's office and
23 questions about the status of supplements to the record were fielded. A conference
24 telephone call was held June 1, 2005, to sort out papers, supplements, a proposed motion
25 from Petitioner on invalidity, and options for rulings by the Board. Following discussions,
26 Petitioner agreed that contents of her motion were actually part of the ordinary advocacy,
27 arguments, and presentation normally made to the Board in a hearing brief and in
28 statements at a hearing on the merits. Petitioner withdrew her motion on June 2, 2005. An
29 Order on Rulings - Addition and Supplements to the Index - was issued by the Presiding
30 Officer on June 6, 2005.
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1 In due course and on schedule, hearing briefs were filed and the Hearing on the Merits
2 occurred in the Whatcom County Courthouse on August 17, 2005. All parties and their
3 counsel appeared. Ms. Franz represented herself. All three board members attended, one
4 via telephone hook-up. A post-hearing letter and attachments were received from Whatcom
5 County enclosing materials on the ordinance processes at Whatcom County and practices
6 on public notice and public participation. These items were mailed to the Board in response
7 to a Board member's questions and a request for further information.
8

10 ISSUES PRESENTED

11 1) Does the rezone of the North Star/Carr MRL, as enacted in Ordinance #2005-003,
12 fail to comply with the Growth Management Act's (GMA) goals and requirements for rural
13 lands, rural elements, and rural development, at:

- 14 ° RCW 36.70A.011
- 15 ° RCW 36.70A.030 (14) a, b, c, d, & g & (15)
- 16 ° RCW 36.70A.070 (1) and (5) b, c & c[ii][iv] and [v]
- 17 ° WAC 365-195-210
- 18 ° WAC 365-195-300 (1) a, rural element
- 19 ° WAC 365-195-330 (1) & (2) c,[iv] & d, [i]
- 20 ° WAC 365-195-500 (1)
- 21 ° WAC 365-195-800 (1)

22 2) Does the subject rezone fail to comply with the GMA's goals and requirements for
23 private property rights, at:

- 24 ° RCW 36.70A.020 (6) & (10)
- 25 ° RCW 36.70A.060 (1)
- 26 ° RCW 36.70A.370 (1) & (2)
- 27 ° WAC 365-195-310 (2) l & m
- 28 ° WAC 365-195-725 (2)
- 29 ° WAC 365-195-855
- 30 ° WAC 365-190-040 (2) g

31 3) Does the subject rezone fail to comply with the GMA's goals and requirements for
32 protection of water and critical areas, at:

- ° RCW 36.70A.030 (5)
- ° RCW 36.70A.080 (1) a
- ° WAC 365-195-070 (1) (3) & (7)
- ° WAC 365-195-200 (5) a, b, c, d

- ° WAC 365-195-305 (1) c & (2) l
- ° WAC 365-195-410 (1) a, b, c, d & (2) a and b

4) Does the subject rezone fail to comply with the GMA's goals and requirements for natural resource lands, at:

- ° RCW 36.70A.030 (10) (11) and Finding-Intent – 1994 c 307
- ° RCW 36.70A.131 (1) & (2)
- ° RCW 36.70A.170 (1) c & d
- ° WAC 365-195-400 (1) & (2) a
- ° WAC 365-195-825 (1) a, b, & c- f [ii] and [iii] and (2) a and b

5) By taking action to adopt the subject rezone has Whatcom County failed to comply with Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas, as outlined in the Washington Administrative Code, at:

- ° WAC 365-190-020
- ° WAC 365-190-030 (2), (4) a, b, and c (11) (12) (14) and (15)
- ° WAC 365-190-040 (1) (2) b[i]
- ° WAC 365-190-070 (1) and (2) a, c, d & d [i] [iii] [iv] [v] [xi] and [xi] l
- ° WAC 365-190-080 (1) a, v (2) a & a[i] [ii] [iii] and at (2)c [i] [iv] and at (5) a [v] & (5)b at [i] [iv] & (5)c [vi]{F}

6) By taking actions to adopt the rezone has Whatcom County failed to comply with the goals and requirements for public notice and participation; denied citizens due process in the SEPA determination of Non-significance; failed to consider alternatives; and failed to protect citizens' health, welfare, and well-being? Did Whatcom County seek assistance from state agencies in recent policy and MRL determinations, especially with long-term planning? See:

- RCW 36.70A.035 (1) a, c, and (2) a
- RCW 36.70A.140
- WAC 365-195-600 (2) a [iii] [iv] [vii] [xi] [xii] and (2) b
- WAC 365-195-610
- WAC 365-195-730 (2) a, b, c
- WAC 365-195-900 (2)

7) Has Whatcom County effectively violated its own Comprehensive Plan at Chapter 8, Resource Lands and its plan policy[s] in its Mineral Resource Lands (MRL) designation criteria? Has Whatcom County essentially violated its own policies and goals in comprehensive planning: Goal 8J, particularly 8J(1), Goal 8K, particularly at 8K(1) and 3, Goal 8L, particularly at 8L(1), (2), and (4), and Goal 8P, particularly at 8P(1), (4), and (5)? (Does this constitute internal inconsistency and non-compliance with the GMA?)

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2 8) Does a portion of the Whatcom County Comprehensive Plan now substantially
3 interfere with fulfillment of the goals and policies of the GMA and should be declared invalid
4 by the WWGMHB? To wit: the North Star/Carr MRL specific amendment to the Whatcom
5 County Comprehensive Plan, expressed in adopted Ordinance 2005-003. And is adopted
6 Ordinance 2005-024, amendments to the Comprehensive Plan, chapter eight (8)- Resource
7 Lands, including Mineral Resource Lands - Designation Criteria, EXCEPT for Criteria 8 and
8 12, interfering with fulfillment of the goals and policies of the GMA?

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10 **DISCUSSION of the ISSUES**

11 **and**

12 **POSITIONS of the PARTIES**

13
14 1. **Does the rezone of the North Star/Carr MRL, as enacted in Ordinance #2005-**
15 **003, fail to comply with the Growth Management Act's (GMA) goals and**
16 **requirements for rural lands, rural elements, and rural development ?**

17 Petitioner brings into focus language of the Act and of the Procedural Criteria for Adopting
18 Comprehensive Plans, and its recommendations for meeting requirements, that provide
19 guidance and implementation terms for rural lands element[s] of a local comprehensive
20 plan. While she states that mining is allowed in rural areas, it "is not characteristic of
21 traditional rural lifestyles...is not compatible for the use of land by wildlife,...it does not
22 preserve open space...as experienced by residents near the North Star MRL, it does not
23 enhance rural sense of community or quality of life." Petitioner's Hearing Brief, p.15.

24 Petitioner asserts enjoyment of property is curtailed and that noise, air pollution, and water
25 contamination effects of mining destroys the quiet rural element. *Ibid*.

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27
28 Of further concern to Petitioner is her belief there are no rural lands in Whatcom County that
29 cannot be designated as Mineral Resource Lands if specific project mitigation is created.
30 This, she asserts, does not comply with RCW 36.70A.070 and local plan directives and
31 guidelines found in WAC 365-195. Petitioner charges Whatcom County has effectively not
32

1 precluded any rural lands from being designated for mineral resources, as required by WAC
2 365-195-300. Pointing to plan policies for the rural element, preservation of critical areas,
3 and provisions for buffers to separate certain rural land uses, as recommended in WAC
4 365-195-330, Petitioner sees an absence of adequate protections in the County's
5 comprehensive plan, stating that Goal 8J of that plan is not at work guiding implementation
6 features of the plan and development regulations (policies, designations and criteria):
7

8 GOAL 8J: Sustain and enhance, when appropriate, Whatcom County's
9 mineral resource industries, support the conservation of productive mineral
10 lands, and discourage incompatible uses upon or adjacent to these lands.
11 *Ibid.* p. 16-26.

12 Turning attention to a local government's achievement of objectives in WAC 365-195-210,
13 particularly concurrency, consistency, and protection of domestic water systems, Petitioner
14 claims in her brief at pages 20, 21, and 25:
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16
17 "Concurrency" – The North Star MRL does not meet the criteria of concurrency
18 because there are no alternatives for water for local residents should the mine impact
19 water resources.

20 "Consistency" – The MRL is inconsistent with preservation of rural character; rural
21 land where mining will not occur; restricting density to one unit per 20 acres with MRL
22 designations. Petitioner further states the mineral resource plan of Whatcom County
23 is rife with inconsistencies and this violates internal consistency provisions of the Act
24 and the WAC.

25 "Domestic water system" "...when a population exists such that many people would
26 be irreparably harmed if the water was compromised....protection of water is
27 paramount. Mining over, in, or adjacent to ground water sources threatens water
28 supplies. Spills have contaminated water supplies, drained aquifers, and forever
29 change the composition and quality of an aquifer. (also Exhibit 140)

30 Concerned the County handles designation of MRL lands erratically over time, Petitioner
31 states that instead of protecting MRLs from incompatible adjacent uses, [this] places MRLs
32 where incompatible uses of land already exist, as evidenced by the North Star site. *Ibid.*

p. 26

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2 On the other hand Whatcom County notes that while the GMA mandates conservation of
3 natural resource lands (including mineral resource lands), there is no similar mandate for
4 the conservation of rural lands. One of the important functions of rural lands is to provide
5 necessary support of and buffering for natural resource lands. *Achen, et al., v. Clark*
6 *County, et al.*, WWGMHB case No. 95-2-0067 (FDO September 20, 1995). Further, the
7 MRL development regulations are not intended to protect development from the resource,
8 but are to be designed to protect the resource from incompatible encroachments. *Id.* While
9 Petitioner contends mining is inherently incompatible with rural character, prior WWGMHB
10 decisions reach a contrary conclusion. The Board held in *Abenroth, et al., v. Skagit County*,
11 WWGMHB no. 97-2-0060c (FDO January 23, 1998) that the GMA does not prohibit mining
12 on non-designated rural lands and that there is nothing in the GMA that disallows mining
13 that is not of long-term commercial significance in the rural zone. The County further argues
14 that not all rural land qualifies under the County's MRL designation criteria: that not all areas
15 are de-facto mineral lands. Goal 8P of the Comprehensive Plan requires that designated
16 MRLs contain commercially significant deposits. Exhibit 109, p.15 of Exhibit A. Stating that
17 Petitioner's argument on this matter is conclusory, MRL designation criteria #1 actually
18 provides that designations contain at least 20 acres with one million cubic yards of proven
19 and extractable sand, gravel, or rock material. Exhibit 109, p. 17 of Exhibit A. Prior to
20 mining in Whatcom County an administrative permit must be obtained and in that process
21 whatever buffers are necessary to mitigate adverse impacts to neighboring properties will be
22 imposed. Brief of Respondent, p.11-13.

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27 **Determination and Conclusion:** The holdings of the Board in prior cases and the
28 arguments of the County are persuasive. The designation of the North Star MRL on rural
29 lands in Whatcom County, and application of its associated 1997 MRL criteria conforms with
30 GMA requirements and WAC guidance for allowable uses and for protecting the character
31 of rural lands. Petitioner has not met its burden of proof pursuant to RCW 36.70A.320(2).
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1
2 **2. Does the subject rezone fail to comply with the GMA's goals and requirements**
3 **for private property rights?**

4
5 Viewing impacts to adjacent rural land uses in the Ferndale area R-5 zone where Petitioner
6 resides as a compromise and deterioration of private property rights, Petitioner states the
7 North Star MRL adversely affects private property rights and constitutes an unjust taking, in
8 violation of a GMA goal: RCW 36.70A.020[6] and of RCW 36.70A.370. Further, she asserts
9 non-monetary losses are experienced by landowners residing adjacent to the North Star
10 property; degradation of health, welfare, water, and quality of life. Past practices of North
11 Star mining site operators raised concern for some adjacent property owners about health
12 threats and quality of life enjoyment. And, citing real estate valuation and sale experiences
13 of her neighbors, Petitioner asserts there is at least a 20 percent loss in property value of
14 nearby homes, including the home and property owned by Linda Franz and her husband.

15
16 Petitioner states in her brief:

17 It is discriminatory that neighboring property owners suffer loss of property
18 value because the County created an MRL benefiting sole business owners at
19 the expense of their neighbors, without compensation, and in violation of GMA
20 mandates. Mining profits and neighboring property owners suffer loss—
21 monetary and quality of life.Whatcom County, instead of planning for
22 future use and need, designating MRLs and compensating individuals when
23 appropriate, uses MRLs to locate mining anywhere. *Ibid.* p.27-28

24 Stating that Whatcom County R-5 rural area residents are denied equal opportunity to
25 preserve neighborhood character when the designation of MRLs over a period of time
26 comes *after* rural neighborhoods develop, Petitioner asserts this is not compliant with
27 preserving the character and vitality of existing neighborhoods noted in the recommended
28 Housing Element features of local comprehensive plans at WAC 365-195-310 (2)[I] and [m].
29 At hearing, Petitioner did note that the R-5 designation is the “odd child of rural lands.” She
30 opines in her hearing brief: “Residents are denied equal opportunity to preserve
31 neighborhood character or vitality when the County declares ad hoc MRLs in areas already
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1 occupied by residential homes.” She further claims the County may not be complying with
2 WAC 365-195-725 (2) if it ignores losses that will be incurred by abutting adjacent property
3 owners and provides no recourse for loss of value, loss of environment, or loss of water
4 should mining affect wells in the area, especially shallow wells. She cites for authority
5 Exhibits 6, 25, and 357. *Ibid p.32*. Petitioner declares the County sets up, rather than
6 avoids, property rights issues. Ordinance 2005-003 has already taken property
7 (devaluation). Petitioner references Exhibits 6 and 332 and WAC 365-195-855. *Ibid p. 34*.
8 Offering the view that Whatcom County has public input but no public discussion, Petitioner
9 worries that processes for defining categories, assigning designations for lands, and
10 informing the public {WAC 365-190-040} in land use planning here puts personal property
11 rights at risk throughout the county, *Ibid. p. 36*.
12
13

14 Respondent County argues that Growth Management Hearings Boards do not have
15 jurisdiction to resolve violations of the United States and/or Washington State Constitution,
16 such as those raised by Petitioner about a taking of private property and property damage.
17 Boards have held this in their own decisions. Note for example, *Roth, et al., v. Lewis*
18 *County*, WWGMHB No. 04-2-0041c (Order on Motions to Dismiss, June 2, 2004). In
19 comprehensive planning a change in designation criteria does not result in any impacts on
20 any particular piece of property. RCW 36.70A.020(6) is thus not violated. Since no mining
21 activity can occur on a designated MRL until an administrative permit is lawfully obtained
22 and any conditions applied, any takings contention, if legitimate, is certainly premature at
23 this stage.
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27 In a post-hearing memo sent in response to a Board question about public participation,
28 counsel for Whatcom County also included text of the County’s Comprehensive Plan Goal
29 and three policy statements on respecting and accounting for Property Rights. Additionally
30 Chapter 8- Resource Lands Goal 8K of the Comprehensive Plan imposes a duty upon
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1 county decision makers to ensure that extraction industries do not adversely affect the
2 quality of life in Whatcom County and that the rights of property owners are recognized.

3
4 **Determination and Conclusion:** The Board's holdings in prior cases cited above are
5 persuasive. The County's argument is persuasive. The Board cannot here conclude the
6 GMA goal to respect property rights [RCW 36.70A.020(6)] was thwarted or violated by
7 Whatcom County. Petitioner did not carry her burden of proof pursuant to RCW 36.70A.320
8 (2).
9

10
11 **3. Does the subject rezone fail to comply with the GMA's goals and requirements**
12 **for protection of water and critical areas?**

13
14 Petitioner Franz writes in her brief and argues at hearing that GMA goals and requirements
15 for protection of water and critical areas are not met with the County's designation of an
16 MRL at North Star (*Ordinance 2005-003*). She cites RCW 36.70A.030; 080 (1)[a]; and WAC
17 365-195-200 at 5 a, b, c, and d; WAC 365-195-305; and WAC 365-195-410 for authority on
18 definitions and to note the valuing of conservation and protection the GMA requires.
19

20
21 The Petitioner states at p. 39 of her hearing brief that, "Included in or near North Star are
22 wetlands; one critical recharge aquifer and two having the same characteristics; the Lake
23 Terrell state wildlife recreation area; watershed for Lake Terrell Creek; wetlands; and areas
24 of Aldergrove Road immediately south of the MRL which flood in winter under certain
25 conditions. Petitioner observes none of this appears to have been taken into consideration
26 in the SEPA Determination of Nonsignificance." Cited for authority and reference are
27 Exhibits 22, 67, 96 127, 140, 342, 343, and 359.
28

29
30 Urging use of provisions in the GMA to achieve conservation and evaluate reasonable
31 alternatives to proposed designations and actions, Franz states mining at the North Star site
32 will threaten potable water availability since the source for such water in that Ferndale R-5

1 area is groundwater. Franz further states that “mines create air pollution and there are no
2 facilities to mitigate dust, noise, and air pollution.” Petitioner adds that high winds are
3 common in that area and that dust, sand, and rocks are common on North Star Road. Cited
4 are Exhibits 128 and 347. Summarizing an argument, Petitioner writes in her brief, “Mining
5 is not consistent with the area, which is rural residential; not consistent with preservation of
6 the rural environment; not consistent with protection of groundwater resources supplying the
7 only source of potable water; and mining in this area is not consistent with the mandate of
8 the GMA to prevent incompatible uses from locating near MRLs. An after-the-fact MRL
9 cannot meet this mandate.” *Ibid at pp. 42-43.*
10
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12 Whatcom County, on the other hand, notes that in 1997, as mandated by the GMA, the
13 County adopted its critical areas ordinance (CAO) to protect critical aquifer recharge areas,
14 wetlands, geologically hazardous areas, alluvial fan hazard areas, frequently flooded areas,
15 and fish and wildlife habitat conservation areas. The proposed updated CAO is undergoing
16 its review and was introduced to the full Council on July 12, 2005. The Petitioner has only
17 challenged Ordinance 2005-003 and 2005-024; thus, arguments directed at critical areas
18 impacts, or areas Petitioner believes should be regarded as critical areas, are not proper
19 here. Such issues are addressed in the current CAO. Any permitted mining activity in the
20 MRL would be required to be mindful of, and comply with, the County’s CAO. Chapter
21 16.16 Whatcom County Code. Brief of Respondent, p. 14.
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25 Woven into Petitioner’s argument about impacts on nearby water and critical areas is a
26 connection she draws to preservation of rural character in rural neighborhoods near mining
27 sites. Whatcom County states it does take rural settlements and population proximity into
28 consideration. Chapter 8 of the Comprehensive Plan features much language addressing
29 this matter. Exhibit 109, pp.5-8, 12-15 of Exhibit A. Criteria 7, 8, 9, and 10 specifically
30 address mining and its potential for incompatibility with residential uses. Exhibit 109, pp. 17-
31 18 of Exhibit A. And, pursuant to plan policy 8P-4, Whatcom County adopted the
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1 development regulations contained in Chapter 20.73 WCC, which chapter requires that prior
2 to legally mining in an MRL one must first obtain an administrative permit. To obtain such a
3 permit an applicant must comply with specific performance standards and ensure all
4 potential impacts are mitigated. *Ibid.* p. 14
5

6
7 **Determination and Conclusion:** The County's argument is persuasive. Likely impacts on
8 water and critical areas of any specific mining operation are dealt with and used as
9 constraints and conditions at the time of evaluating a request for an administrative permit for
10 mining in Whatcom County; not in comprehensive plan amendments about natural
11 resources, in a Critical Areas Ordinances, nor in designations of MRLs such as Ordinances
12 2005-003 and 2005-024. The full tool kit of protections in Whatcom County's
13 Comprehensive Plan, Policies, and development regulations and in Chapter 20.73 of the
14 Whatcom County Code (WCC) are used to evaluate for approval or denial and condition any
15 mining permit under consideration by the County. Petitioner has not met the burden of
16 proof, pursuant to RCW 36.70A.320.
17

18
19 **4. Does the subject rezone fail to comply with the GMA's goals and requirements**
20 **for natural resource lands?**
21

22 The impact on managing natural resources of long-term commercial significance is applied
23 by Petitioner to designation of optimally-sized mineral resource lands. Her discussions with
24 Department of Natural Resources [DNR] geologists reveal that 160 acres is a good
25 minimum size for an MRL: not the 20-acre county minimum standard (county criterion) that
26 under girded the North Star NRL designation. Disputing the County's findings, Franz states
27 that the North Star site only adds .30 percent to the MRL land base in Whatcom County, not
28 the 1.3 percent county studies determine, and that very small percentage cannot be
29 construed to meet standards of long-term commercial significance for Whatcom County.
30 This circumstance at North Star MRL, Petitioner argues, does not meet the terms of RCW
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32

1 36.70A.030(10) and the Finding-Intent – 1994 c307 language of the GMA nor of RCW
2 36.70A.131(1).
3

4 Size creates an area of “substantial opportunity” which, Petitioner posits, can be equated to
5 “long-term commercial significance.” Petitioner expresses concern that North Star’s 37
6 acres of combined lots will be difficult to manage and reclaim. Petitioner Franz claims “the
7 purpose of MRLs is to identify and protect new resource areas, not expand current mines or
8 MRLs in inappropriate (places). The MRL in question is spot-zoning. A plethora of small
9 mines is not a plan – it’s a dartboard.” *Ibid. pp. 47-48.*
10
11

12 Registering concern about the County’s meeting the actual terms of RCW 36.70A.131 at (1)
13 and (2), Petitioner additionally argued, based on her conversation with a county employee,
14 Jim Karcher, that the quality of pit-run gravel and other rock at North Star has not been in
15 significant demand by the state’s Department of Transportation for road bed material. Franz
16 asserts North Star’s production of common borrow fill is not unique and not in strong
17 commercial demand, that it is used for pipe bedding and storm sewer (bedding support),
18 which is a low volume need.
19
20

21 The County’s primary reliance on GeoEngineers, Inc. September 30, 2003, “Report:
22 Engineering Geology Evaluation, Aggregate Resource Inventory Study, Whatcom County,
23 Washington” (Exhibit 97), and its apparent lesser reliance on DNR studies and data,
24 puzzled Petitioner. Ms. Franz wonders about the County’s use of recommendations of a
25 private firm in the minerals industry. Also referenced in her brief is her view that the report
26 is limited in scope and ignores the need to search for mineral deposits in undeveloped
27 areas of the County.
28
29

30 Expressing views in her briefing and at hearing that the County has been uneven in its
31 planning for mineral resource lands during the past 14 years, she offers her view this has
32

1 led to competing values and land uses that have several negative impacts. Petitioner cites
2 the County's first failure to meet a mineral resources and critical areas designations
3 deadline in 1991, set forth in RCW 36.70A.170(1)[c] and [d] and the terms of WAC 365-195-
4 400 (1) and (2)a. *Ibid.* pp. 50-52. Later designations of MRLs in the 1990s still did not
5 complete the County's inventorying and planning efforts for mineral resource lands. Yet
6 natural resources-oriented comprehensive plan amendments and development regulations
7 for Whatcom County were adopted periodically over the last 14 years. Petitioner Franz cites
8 several sub-sections of WAC 365-195-825 to observe that uneven natural resources lands
9 planning and MRL designations appears not to follow the dictates of several features of
10 WAC 365-195 (Growth Management Act – Procedural Criteria for Adopting Comprehensive
11 Plans and Development Regulations).
12
13

14
15 Whatcom County argues that County's policy is to conserve agricultural land and respect all
16 resource lands, including those that may be, or are, designated as mineral resource lands in
17 keeping with GMA requirements to conserve and manage all resource lands. Rural lands
18 are a clear candidate for MRL designations where the criteria for demonstrating one million
19 cubic yards of proven and extractable sand, gravel, and valuable metallic substances is met
20 and a 20-acre minimum standard can be met. Exhibit 109. The GMA does not preclude
21 classification or designation of additional mineral resources. WAC 365-190-070(2). In
22 deciding upon a minimum size standard and what constitutes commercially viable mineral
23 deposits, the County tailored its criteria to local circumstances that include the reality of a
24 rapidly diminishing and limited non-renewable resource. Brief of Respondent at pp. 15-16.
25 Intervenor notes that securing a 50-year minerals supply was actively discussed and
26 debated during the adoption process of the 1997 Comprehensive Plan. As a result the
27 County included an action item within the mineral resources chapter of the plan stating:
28
29

30 Budget, initiate and complete a Comprehensive Construction Aggregate Study
31 (CCAS) to document the short and long range availability and location of
32 quality mineral resources, to be completed within five years of the adoption of
this Comprehensive Plan Update the CCAS as needed based on the outcome
of the study. (Plan, Ch. 8).

1
2 The 1997 Plan also contained a directive to maintain “an ongoing advisory committee
3 consisting of representative of diverse interests” to further study issues pertaining to the
4 conservation of MRLs. In 2000 the County Council established the Surface Mining Advisory
5 Committee (SMAC). The SMAC commenced work on an action item in Chapter 2 of the
6 Whatcom County Comprehensive Plan that provides:

7 The Mineral Resource Land Map designations and/or designation criteria
8 should be reviewed at least once every seven years to determine if changes
9 are necessary to meet mineral resource goals and policies. Such review
10 should include consideration of the removal of land from Mineral Resource
11 Designation after mining activity is completed and the addition of new
12 designations in order to maintain a 50-year supply of mineral resources.
13 Review may occur through sub-area plan updates provided a complete review
14 will occur within the seven year time frame.

14 *Ibid. p. 6*

15 In January 2001, the Department of Natural Resources issued a study entitled
16 Reconnaissance Investigation of Sand, Gravel, and Quarried Bedrock Resources in
17 Bellingham 1:100,000 Quadrangle, Washington. Exhibit 89. The report states the working
18 life of most significant pits in that area is 10 to 20 years. Following this, and in fulfillment of
19 the 1997 comprehensive plan mandate action item, the GeoEngineers study (Exhibit 97)
20 was accomplished and issued on September 30, 2003. Study authors concluded that MRL
21 designations that existed in 2003 contained about 17 years worth of mineral material supply.
22 GeoEngineers did examine the North Star area, determining it was a localized deposit of
23 mineral resources that may extend beyond the historic 16-acre site that was operating under
24 a state DNR permit in the subject area. *Intervenor’s Response Brief at pp.6-7.*

25
26
27
28 Much of the known mineral resource is located under agricultural lands of long-term
29 commercial significance outside of western Whatcom County. The County made a
30 deliberate choice to rank high the conservation of such lands devoted to agricultural use.
31 Exhibit 109, p.19 of Exhibit A, Exhibits 97 and 148. Most of the other known deposits are in
32 pockets around rural areas. The resource is limited in the western part of the County. In

1 Intervenor's Response Brief at p. 5, Intervenor notes that mineral resources within the North
2 Star MRL were designated in an attempt to provide sufficient sand, gravel, and hard rock to
3 provide for the 50-year planning horizon that is recommended under the classification
4 system published by the Department of Natural Resources. Exhibit 332, p. 27. Further,
5 none of the cities in Whatcom County have designated mineral resources and it is assumed
6 that mineral resources for these areas will be provided by Whatcom County unincorporated
7 areas. The Department of Natural Resources notes there are practical limitations on large
8 deposits identified (160 acres and larger) in western Whatcom County because they are
9 thin, dominantly sand, and the current land use is well-established farms and residential
10 developments. Exhibit 89, p. 11. In fact there are many 20-acre or smaller active pits that
11 have been commercially viable operations in Whatcom County for decades. Exhibit 89,
12 Appendix 2. Brief of Respondent, pp. 15-16.
13
14

15
16 In February of 2004 the SMAC convened for the first of 16 open public meetings in an eight-
17 month period. Exhibit 148, p.4. The SMAC reviewed the DNR Bellingham Quadrangle
18 report and the GeoEngineers Report (Exhibits 97 and 89) and reviewed GIS-generated data
19 and maps of potential resources areas depicting various pertinent data. As well, they
20 considered the expertise of individual SMAC members. The SMAC deemed Plan Policy
21 8P-1 was not being met by existing MRLs and the deficit could not be met by designating all
22 additional potential resource areas outside of the agricultural zoning district. Exhibit 149,
23 Findings and Conclusions Nos. 4 and 5. In the ensuing designation effort, Whatcom County
24 designated 24 MRL areas covering 4,204 acres. Most of these are east of Interstate
25 Highway 5 and north of Bellingham in rural areas of the county. *Ibid.* p.7.
26
27

28 Whatcom County strenuously objects to Petitioner's characterization of the County's
29 process of designation as spot zoning. The designation process is in keeping with the
30 comprehensive plan and done in furtherance of the public interest. *Save a Neighborhood*
31 *Environment v. Seattle*, 101 Wn.2nd 280,286,676 P.2d 1006 (1984). And, the County urges
32

1 that the Growth Boards have no jurisdiction to rule on spot zoning challenges. *PRRVA v.*
2 *Whatcom County*, WWGMHB case No. 00-2-0052 (Final Decision and Order, April 6, 2001).
3 Brief of Respondent, pp.15-17.

4
5 **Determination and Conclusion:** Whatcom County's arguments are persuasive. The
6 County balanced interests and used a lawful method of investigating, assessing, and
7 designating mineral resources lands over time, even if not an ideal one. Closely protecting
8 agricultural and forest lands from most mineral resources designations was a reasonable
9 choice. It is a local option to tailor a balance in conservation of agricultural, forest, and
10 mineral resource lands. The County referenced its 1997 Comprehensive Plan and
11 adequately consulted technical and expert advisors to evaluate the request for a North Star
12 MRL that is the subject of Ordinance 2005-003. Petitioner has failed in her burden to show
13 that the designation process for natural resource lands, specifically the North Star MRL,
14 does not comply with the GMA (RCW 36.70A.030 and .171) and with the Whatcom County
15 Comprehensive Plan. The cases cited on spot zoning are persuasive.
16
17

18
19 **5) By taking action to adopt the subject rezone has Whatcom County failed to**
20 **comply with Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands**
21 **and Critical Areas, as outlined in the Washington Administrative Code?**

22 Directing attention to the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands
23 and Critical Areas (WAC 365-190), in arguments and recitations, Petitioner disputes the
24 accuracy of the County's computation that the North Star MRL would increase the mineral
25 resources land base by 1.3 percent. Franz calculates it as .30 percent. Petitioner states the
26 subject 37-acre site includes critical areas that must be buffered and otherwise protected
27 asserting that the GeoEngineers Report included those areas in mineral material available.
28 Exhibits 335, 336, and 337. She observes Respondent County should not have allowed the
29 inclusion of some 'grandfathered pit' acreage in its North Star MRL designation since it is
30 "almost depleted." *Ibid. pp. 55-59.*
31
32

1
2 Petitioner also reaches to include an assertion in her statements about Issue 6 that the
3 County simply failed to examine alternative sites in its SEPA analysis for the North Star
4 MRL designation proposal and disputes the County's use of a Declaration of Non-
5 significance which she thinks should have been part of the fulfillment of recommendations
6 and guidance to local governments in WAC 365-190, particularly in MRL designation and
7 critical areas review.
8

9
10 Because Petitioner is concerned about irreparable harm to the groundwater in the area
11 under and around the North Star MRL, because of past problems with contamination from
12 industrial uses, she finds mining at North Star is too risky. Because of shallow well nitrate
13 contamination problems and risk to deeper wells, she asserts water systems currently in
14 place cannot handle more users. *Ibid. p. 60.* Ms. Franz notes in WAC 365-190-080
15 (1)[a]{v}, a directive to counties to adequately address wetlands, via a rating system, in
16 comprehensive plans and development regulations. The ability to compensate for
17 destruction or degradation of wetlands should be reckoned with. She wonders how
18 wetlands preservation is feasible, given the history of operation of small mining enterprises
19 in Washington. *Ibid. p. 64.* Petitioner asks how the County has planned for susceptibility to
20 water and wetlands contamination as a filtration layer of sand is removed in North Star
21 operations. She discerns from studies and reports that Lake Terrell Creek and its
22 watershed and the Lake Terrell state wildlife recreation area are vulnerable.
23
24
25

26 Respondent County noted at hearing and in its briefing that a proper venue for making
27 specific critique and objection, and request for tight conditions on any request for a mining
28 operations permit, is at the County when the application is officially reviewed, not in an
29 ordinance adopting an amendment to the Comprehensive Plan. Use of all comprehensive
30 plan goals, policies, and criteria comes into play, including that for critical areas, when
31 considering the nature of an administrative permit and any conditions to be placed on it. In
32

1 outlining its process for designations of mineral resource lands by amendment to its
2 Comprehensive Plan, the County noted at hearing and in its brief that it followed the
3 guidance in WAC 365-190. It also exercised its local options to tailor criteria--- all of which
4 come into play in reviewing specific requests for a mining permit--- in accordance with local
5 conditions as known to them in reports it consulted and commissioned in enacting
6 Ordinance 2005-003. Argument at Hearing and Brief of Respondent at p.15.
7

8
9 The County and Intervenor detail the submission of an application for MRL designation for
10 the subject property on December 30, 2003. Exhibit 95. As well, they provide accounts of
11 the SEPA process and adherence to WAC 197-11 guidelines which Petitioner questioned.
12 The applicant obtained consent from the County Council to docket the potential
13 Comprehensive Plan amendment, pursuant to Chapter 20.10 WCC. The Council agreed to
14 place the request on the docket and notified the public of the application via the *Bellingham*
15 *Herald* on February 22, 2004. Exhibit 86. Intervenor Carr submitted an environmental
16 checklist, as required by WAC 197-11-315. Exhibit 96. He also submitted a Wetlands
17 Delineation Report on May 3, 2004, and a geotechnical report on June 1, 2004. Exhibits 22
18 and 21. Comments on the project were received from County staff on wetlands and road
19 issues. Exhibits 43 and 83. On March 29, 2004, Petitioner Franz submitted a detailed
20 response to the checklist. Those comments were accepted and made a part of the file.
21 Exhibit 67. In accordance with terms of WAC 197-11-330 the County SEPA official, John
22 Guenther, reviewed the proposed action, information on the checklist, additional information
23 in the file and issued a Declaration of Nonsignificance (DNS) on May 10, 2004. Exhibit 92.
24 The SEPA official considered the variety of local, state, and federal regulations that would
25 be available to require the applicant to mitigate impacts on adjacent uses in complying with
26 terms of any administrative permit that might be issued. In accordance with WAC 197-11-
27 340, Mr. Guenther sent the DNS and checklist to all agencies listed in that regulation and
28 published notice of DNS issuance, as required by WAC 197-11-510 and WCC 16.08.130.
29
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1 Exhibit 84 and 85. The DNS became final on May 25, 2004, and was not appealed within
2 the required 10 days thereafter, as required by WCC 16.08.170(1)(a). *Ibid. pp.17-18.*

3 In this North Star matter, the Petitioner's concern about the impact of mining on
4 groundwater, for example, would be raised at the administrative permit stage and the
5 County geologist would typically require a groundwater assessment by a hydrogeologist and
6 require mitigation measures based on that report. Exhibit 223, pp. 3, 4, and 8. If the permit
7 stage is reached, another threshold SEPA determination will be made and, if probable,
8 significant impacts exist, an environmental impact statement or a mitigated DNS would be
9 required. *Ibid. p.22.*

10
11
12 **Determination and Conclusion:** Petitioner did not carry the burden of proving the County
13 erred in its application of pertinent WAC guidelines (or of the applicable Whatcom County
14 Comprehensive Plan and Whatcom County Code) in the designation of additional mineral
15 resource lands through adoption of Ordinance 2005-003, an MRL designation amendment
16 to the 1997 Whatcom County Comprehensive Plan. The SEPA process is staged in
17 Whatcom County, applied both programmatically and specifically, and is not complete for a
18 mineral resource lands matter until a final determination is made on an administrative
19 approval permit for mining operations. Petitioner participated in the SEPA process to date
20 and, in her case briefing, did not demonstrate the County failed to properly utilize that
21 process in issuing a DNS on the subject MRL designation. The County's arguments are
22 persuasive.
23
24
25

- 26 6. **By taking actions to adopt the rezone has Whatcom County failed to comply**
27 **with the goals and requirements for public notice and participation; denied**
28 **citizens due process in the SEPA determination of Non-significance; failed to**
29 **consider alternatives; and failed to protect citizens' health, welfare, and well-**
30 **being? Did Whatcom County seek assistance from state agencies in recent**
31 **policy and MRL determinations, especially with long-term planning?**
32

1 Actual public notice and public participation deficits may have denied citizens due process
2 in the SEPA determination and the MRL designation formal adoption on this matter Ms.
3 Franz offers. She also states she is unable to see where or how the County considered
4 alternatives to designating the North Star site an MRL. Citing RCW 36.70A.035 and .140
5 and WAC 365-195-600 and -610 Petitioner Franz challenges the completeness of notice,
6 the actual provision for early and continuous public participation in the development and
7 amendment of plans and regulations, the actual dissemination of the MRL proposal and
8 alternatives, and provision for open discussion with the public. *Ibid.* p. 69-71.
9

10
11 Petitioner states in her brief she sees few signs the County timely consulted and
12 coordinated with key state and federal agencies prior to adopting the North Star MRL and
13 amending provisions of its comprehensive plan and zoning code. To support her claims that
14 inadequate consultation occurred, or was absent altogether, Petitioner cites WAC 365-195-
15 715 (1), (2), and (3), WAC 365-195-730 (2)[b] and [c], and WAC 365-195-900 (2) as
16 applicable to the County's process of planning and consultation with relevant governmental
17 authorities. Franz posits that effective features of the WAC would have resulted in notation
18 of relevant laws and potential or actual law conflicts, invoking of Clean Water Act
19 requirements, and documented use of Best Available Science in developing policies and
20 regulations for proper designation of mineral resource lands. Petitioner states opportunities
21 for public comment were, in her view, not equitable, that early notification of the proposed
22 MRL did not occur, and that notices to the public comment deadlines and appeal to the
23 Hearing Examiner deadlines were squeezed to unacceptable levels. Exhibits 67 and 96.
24 The effectively one-day comment period on the proposed Declaration of Nonsignificance of
25 called out by Petitioner as especially grievous. Exhibits 85, 92, and 333. Petitioner states
26 solid information on participating in comment on comprehensive plan amendment and the
27 mining permit process and information on the North Star proposed mining endeavor was not
28 available or forthcoming. Franz found the County's published DNS notification incomplete
29
30
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32

1 and confusing. Petitioner gives a failing grade to the County on reaching out to private
2 affected parties, such as adjacent area homeowners. *Ibid. pp. 73-77.*

3
4 Incorporating several features of her argument, Petitioner notes and finds instructive a
5 Western Growth Board case (03-2-0006) Final Decision and Order, involving Jefferson
6 County that requires proper evaluation of the environmental impacts of alternatives in a
7 SEPA analysis and cites the County for failure to accomplish that evaluation under terms of
8 RCW 43.21C.
9

10
11 In addition to notice requirements, the GMA public participation requirements include an
12 adequate opportunity to be heard. RCW 36.70A.140. Whatcom County states that in GMA
13 processes and the associated SEPA process, Petitioner's argument that the County provide
14 the public with more than opportunity to comment is misplaced. Petitioner suggests some
15 sort of discussion or dialogue with the public is required. Whatcom County notes than in
16 WWGMHB Case No. 03-2-0007, Amended Final Decision and Order of November 3, 2003.
17 *Better Brinnon Coalition v. Jefferson County*, the Western Board stated:
18

19 Local decision makers must allow citizens to make their feelings known
20 but the county commissioners do not have to follow them, let alone must they
21 engage in a particular form of interactive discussion such as Petitioner
22 suggests should have been done here.

23 The GMA public participation requirements do not require the county
24 commissioners to use public opinion to adopt a particular course of action;
25 they just require the public be given an opportunity to comment throughout the
26 decision-making process.

27 Brief of Respondent, p.20

28 Whatcom County outlines its compliance with notice requirements of state and local law in
29 its briefing and post-hearing brief sent in response to a Board question at hearing.
30 Petitioner and many others took advantage of many opportunities to address County staff
31 and decision makers both orally and in writing since March 2004, including the Surface
32 Mining Advisory Committee, the Planning Commission, the County Council Natural

1 Resources Committee, and the County Council as a whole during the MRL process that
2 lasted several months. Exhibits 5, 6, 7, 11, 12, 13, 15, 16, 47, 48, 49, 52, 53, 54, 55, 56, 57,
3 60, 61, and 88. Exhibit 222, pp. 12-18; Exhibit 223, pp. 5-8; Exhibit 224, pp. 2-5 and Exhibit
4 225, pp. 3-4. Petitioner's extensive involvement in the process is well documented in the
5 record. In addition to participating in the public hearing process, Petitioner frequently
6 conversed through e-mail with County staff. Exhibits 8, 99, 20, 30, 58, 59, 62, 63, 64, 65,
7 and 66.
8

9
10 **Determination and Conclusion:** The Board's holdings in the WWGMHB Case No. 03-2-
11 0007 are persuasive in its application to this case, as are the arguments of the Respondent
12 County. The process followed by Whatcom County in the adoption of Ordinance 2005-003
13 is well-documented and complied with the requirements of the Whatcom County Code and
14 the GMA. Petitioner participated orally and in writing at a number of points in the ordinance
15 process and continues to do so. Petitioner has not carried the burden of proving that the
16 County's public participation and notice activities and their review and consultation actions
17 during the pendency of the ordinance were clearly erroneous.
18
19

20
21 **7. Has Whatcom County effectively violated its own Comprehensive Plan at**
22 **Chapter 8, Resource Lands and its plan policy[s] in its Mineral Resource Lands**
23 **(MRL) designation criteria? Has Whatcom County essentially violated its own**
24 **policies and goals in comprehensive planning: Goal 8J, particularly 8J(1), Goal**
25 **8K, particularly at 8K(1) and 3, Goal 8L, particularly at 8L(1), (2), and (4), and**
26 **Goal 8P, particularly at 8P(1), (4), and (5)? (Does this constitute internal**
27 **inconsistency and non-compliance with the GMA?)**

28 Questioning the compliance with the GMA of the Whatcom County Comprehensive Plan
29 Chapter 8, Resource Lands, specific MRL designation criteria and the manner of public
30 notice and participation for Whatcom County are overarching matters for Petitioner.
31 Certainly, Petitioner directly opposes the North Star MRL designation near the City of
32 Ferndale and any eventual permitting of mining at that site. The outcomes to date are
unacceptable to her. Argument at hearing.

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2
3
4 The Comprehensive Plan Goals and Policies challenged are:
5

6 Goal 8 J: It is referenced and stated earlier in this decision.

7 Policy 8J -1: Conserve for mineral extraction designated mineral resource lands of long-term
8 significance. The use of adjacent lands should not interfere with the continued use of
9 designated mining sites that are being operated in accordance with applicable best
10 management practices and other laws and regulations.

11 Goal 8K: Ensure that mineral extraction industries do not adversely affect the quality of life
12 in Whatcom County, by establishing appropriate and beneficial designation and resource
13 conservation policies, while recognizing the rights of all property owners.

14 Policy 8K-1: Avoid significant mineral extraction impacts on adjacent or nearby land uses,
15 public health and safety, or natural resources.

16 Goal 8L: Achieve a balance between the conservation of productive mineral lands and the
17 quality of life expected by residents within and near the rural and urban zones of Whatcom
18 County.

19 Policies 8L – 1: Discourage new residential uses from locating near designated mineral
20 deposit sites until mineral extraction is completed unless adequate buffering is provided by
21 the residential developer.

22 8L -2: Protect areas where existing residential uses predominate against intrusion by
23 mineral extraction and processing operations.

24 8L-4: Buffer mineral resource areas adjacent to existing residential areas. Buffers
25 preferably should consist of berms and vegetation to minimize impacts to adjacent property
26 owners. Buffers should be reduced for a limited period of time during reclamation is quality
27 minerals are contained therein.

28 Goal 8P Designate Mineral Resource Lands (MRLs) containing commercially significant
29 deposits throughout the county in proximity to markets in order to avoid construction
30 aggregate shortages, higher transport costs, future land use conflicts and environmental
31 degradation. Balance MRL designations with other competing land uses and resources.

32 8P-1: Seek to designate a 50-year supply of commercially significant construction aggregate
supply, to the extent compatible with protection of water resources, agricultural lands, and
forest lands.

8P-4: Allow mining within designated MRLs through an administrative approval use permit
process, requiring:

(1) on-site environmental review, with county as lead agency, and

- (2) application of appropriate site-specific conditions, and
- (3) notification to neighboring property owners within 1000 feet to insure opportunity for written input and/or appeal, and
- (4) access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

8P-5: Consider potential resource areas identified in the *Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington* (GeoEngineers, Inc. Sept. 30, 2003) during county review of land development projects in order to avoid development incompatible with mineral resource extraction.

The MRL designation criteria discussed in various briefs and at hearing by Petitioner appear to be the twelve criteria listed under I. Non-metallic Mineral Deposits in Chapter 8 – Resource Lands section of the updated Comprehensive Plan. A review of the record in this case does not show solid and direct objection to Criteria 4, 5, 6, 9, or 11. The Board determines they were not pursued. Petitioner stated in her issues presented that she does not object to Criteria 8 and 12.

Elsewhere in this discussion of issues and presentation of the position of the parties, Petitioner's arguments challenging criteria 1, 2, 3, 7, and 10 and citations to relevant state statutes and code is summarized and discussed.

Respondent County states that after the recent Comprehensive Plan update, the majority of the substance of the mineral resource lands element of the Comprehensive Plan remained unchanged from the version challenged in *Wells, et al., v. Whatcom County, et al.*, WWGMHB Case 97-2-0030c (FDO January 16, 1998). The County urges that the Board's words at page 12 in that decision in that case are still applicable in the present case:

Similarly, there is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. Although existing mining activity should be conserved by mineral lands designation, it will not necessarily be enhanced. As the County stated, mineral lands designation is not a right to mine. (emphasis added). CP Policy 8P-4 provides:

Allow mining within designated MRLs through zoning and a discretionary and administrative permit process, requiring:

1. On-site environmental review, with county as lead agency, and

2. application of appropriate site-specific conditions, and
3. notification to neighboring property owners within 1000 feet to insure opportunity for written input and/or appeal, and
4. access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

Whatcom County states that all criteria apply in any county review of a proposed MRL for non-metallic mineral resources. No criterion trumps another. Beyond the "general criteria" classification for non-metallic mineral lands they are grouped according to land use elements: Additional Criteria for Urban and Rural Land, Forest Lands and Agricultural Lands Brief of Respondent, p. 10.¹

Determination and Conclusion: Whatcom County's explanation of its use of MRL designation criteria in the review of potential MRLs and in providing language that can be used to determine the wisdom of granting or denying an administrative permit and applying any conditions thereto is persuasive. The criteria set for in Ordinance 2005-024 are consistent with policies in the comprehensive plan. The amendments to the 2004 Whatcom County Comprehensive Plan are not internally inconsistent with the rest of Whatcom County's 2004 Comprehensive plan and therefore comply with RCW 36.70A.070.

The record made by the County here during consideration of these subject ordinances does not support Petitioners' arguments that the criteria operate to err in designating commercially viable lands with proven mineral resources or to impermissibly impact residential uses near and adjacent to a mineral lands designation in violation of plan policies. The right to mine does not become legal unless a project-specific review occurs and an applicant is granted an administrative approval use permit by the county. In light of

¹ Project-specific review (see Policy 8P-4) will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns and file comments and recommendations with county officials. If they disagree with the issuance of any particular administrative permit Petitioner and others have a right to appeal to the County Hearing Examiner.

1 these factors, Petitioner's arguments and presentation fails to prove the two challenged
2 2005 ordinances, and the goals, policies, designations and criteria linked together and
3 incorporated into the updated Whatcom County Comprehensive Plan, results in internal
4 inconsistency or violation of the GMA.

5
6
7 **8. Does a portion of the Whatcom County Comprehensive Plan now substantially**
8 **interfere with fulfillment of the goals and policies of the GMA and should be**
9 **declared invalid by the WWGMHB? To wit: the North Star/Carr MRL specific**
10 **amendment to the Whatcom County Comprehensive Plan, expressed in**
11 **adopted Ordinance 2005-003. And is adopted Ordinance 2005-024,**
12 **amendments to the Comprehensive Plan, chapter eight (8) - Resource Lands,**
13 **including Mineral Resource Lands - Designation Criteria, EXCEPT for Criteria 8**
14 **and 12, interfering with fulfillment of the goals and policies of the GMA?**

15 Asserting the several circumstances surrounding the North Star MRL planning and siting
16 process is riddled with error and the formal adoption of amendments to the County's plan
17 risky, Petitioner asks the subject ordinances be invalidated. Petitioner sees endangering of
18 public health, the environment, quality of life and use of one's property, and to nearby
19 property values. Petitioner requests that the North Star/Carr MRL specific amendment to
20 the Whatcom County Comprehensive Plan (Ordinance 2005-003) and amendments to the
21 Comprehensive Plan, Chapter Eight (8) - Resource Lands, Mineral Resource Lands
22 Designation Criteria, with the exception of those referenced above, in Ordinance 2005-024
23 be invalidated. *Ibid. p. 113-115.*

24
25 Respondent County in briefing, through exhibits, and at hearing delineated its processes of
26 GMA and SEPA compliance and described its use of public participation, technical studies,
27 consultation with experts, staff analysis and recommendations, and utilization of a Surface
28 Mining Advisory Committee, the Planning Commission, and the County Council Natural
29 Resources Committee to arrive at proposed mineral resources ordinances and then adopted
30 them. In making these difficult choices in planning and designation for mineral resource
31
32

1 lands, the County was reasonable and compliant with the terms of the Growth Management
2 Act in its approach to or adoption of the ordinances.

3
4 At hearing the County's representative noted that active planning, monitoring, and review
5 processes are utilized to determine how implementation of Comprehensive Plan elements is
6 faring. Further, the practice of attaching conditions to permitted industrial, including mining,
7 projects is customary. The County urges that invoking invalidity on the MRL element of the
8 Comprehensive Plan and the designation criteria is not appropriate or necessary.
9

10
11 **Determination and Conclusion:** The Board determines that the designation of the North
12 Star Property is compliant. There is no reason to conclude Whatcom County will not utilize
13 all the tools in the comprehensive plan, development regulations, zoning code, and its
14 Critical Areas Ordinance to permit and monitor any mining operations connected with this
15 designation. The Board also determines the new MRL criteria to be compliant. Therefore,
16 the Board determines the implementation of these challenged Whatcom County
17 Comprehensive Plan ordinances, Nos. 2005-024 and 2005-003, will not substantially
18 interfere with the fulfillment of the goals and policies of the GMA.
19
20

21 FINDINGS OF FACT

22
23 1. Mineral deposits are located in eastern Whatcom County and in a variety of small
24 and large acreages and landscapes in the western part of the County. The North Star
25 mineral resources designation site is approximately four miles from the City of Ferndale on
26 North Star Road and located in a rural zone of Whatcom County north of Bellingham.

27 2. Rural lands in the R-5 zone are eligible for designation as mineral resources lands at
28 the local option of Whatcom County when lawful and appropriate criteria are utilized. Not all
29 rural lands are eligible for mineral resource lands designation.
30
31
32

- 1 3. Rural residents can advocate for, and expect, basic protection of public health and
2 the welfare of persons and property in Whatcom County when they select the appropriate
3 avenues to seek protection and relief.
- 4 4. Rural lands in Whatcom County may be used to support and provide buffering from
5 natural resources designated land uses so any rural development and the natural resources
6 uses both achieve some graduated protections.
- 7 5. In local comprehensive planning a change in designation and designation criteria
8 does not itself result in any impacts on any particular piece of property.
- 9 6. Whatcom County follows state guidelines on protection of property rights and has
10 incorporated goals and policies in its Comprehensive Plan that directly reference respect
11 and protection for property rights.
- 12 7. In or near the North Star MRL designation are wetlands, at least one critical recharge
13 aquifer; the Lake Terrell state wildlife recreation area; the watershed for Lake Terrell Creek;
14 and areas south of Aldergrove Road that flood in winter under certain conditions; the
15 County's compliant critical areas ordinance will be applied at the time of permitting to protect
16 these critical areas.
- 17 8. There were historic problems with wastewater and noise management, groundwater
18 contamination, and pollution on the North Star site under other ownership and management
19 of mining operations. There are state agency enforcement citations in the public record that
20 document such events.
- 21 9. Geologic studies of the North Star mining industrial area, a site of approximately 37
22 acres, indicate sand and gravel in commercially significant amounts is still deposited there,
23 even though part of the site has been mined in years past. This adequately qualifies the
24 site for MRL designation.
- 25 10. In Whatcom County a specific mineral resources site designation request is received
26 by the County Council and must be considered through the County's annual amendment
27 process; this process includes SEPA review and determination. Additional SEPA review is
28 required as result of application review for an administrative approval permit to mine.
- 29
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- 1 11. The Department of Natural Resources' *"Reconnaissance Investigation of Sand,*
2 *Gravel, and Quarried Bedrock Resources in Bellingham 1:100,000 Quadrangle,*
3 *Washington"* and the GeoEngineers, Inc. September 30, 2003 *"Report: Engineering*
4 *Geology Evaluation, Aggregate Resource Inventory Study, Whatcom County, Washington"*--
5 - along with the expertise and expressed opinions of local residents, county staff, state
6 resource agency personnel, and Surface Mining Advisory Committee members--- were
7 relied upon in formulating new MRL designation criteria.
- 9 12. In ranking resource protection and enhancement, Whatcom County elected not to
10 designate most agricultural and forest lands as mineral resource lands.
- 11 13. A lengthy public participation and lands analysis process occurred during the
12 development and consideration of MRL ordinances 2005-024 and 2005-003, particularly in
13 2004 and 2005. Formation of a Surface Mining Advisory Committee, legal notices of actions
14 contemplated, the availability of technical studies and publications, staff analysis, a SEPA
15 determination process, review by the Planning Commission, and opportunities to
16 communicate with County staff and appointed and elected officials, at hearings and
17 informally, provided for an adequate public review and assessment of proposed MRL
18 designations and criteria.
- 20 14. The MRL designation 12 criteria listed under I. Non-metallic Mineral Deposits in
21 Chapter 8 – Resource Lands section of the updated Comprehensive Plan operate together
22 to provide appropriate evaluation tools for selection of MRLs and to set the stage for
23 conditioning, approval, or denial of any permits for mining operations sought for sand,
24 gravel, and rock deposits in the County.
- 26 15. Whatcom County followed its GMA-compliant 1997 criteria appropriately to designate
27 the North Star Property.
- 28 16. Whatcom County's new MRL designations are consistent with the MRL policies in its
29 comprehensive plan.
- 31 17. An MRL designation is not a right to mine in designated lands.
- 32

1 18. Whatcom County has a demonstrated variety of planning, research, monitoring,
2 review, and enforcement tools available to ensure proper implementation of the MRL
3 designation process, with applicable criteria to guide permit evaluations and management of
4 these lands, including mining operations that may be permitted to operate on them.

5 19. Because the County's adoption of Ordinances 2005-003 and 2005-024 complies with
6 terms of the Growth Management Act and the Whatcom County Comprehensive Plan, the
7 Board need not rule on the request for invalidity.

8 20. Any Finding of Fact hereafter deemed to be a Conclusion of Law is hereby adopted
9 as such.
10
11

12 CONCLUSIONS of LAW

13

14 A. Whatcom County is located west of the crest of the Cascade Mountains and is
15 required to plan, and does plan, for management of growth under terms of Chapter 36.70A
16 RCW.
17

18 B. This Board has jurisdiction over the parties and subject-matter of this case. RCW
19 36.70A.
20

21 C. Petitioner Franz timely filed her petition for review.

22 D. Linda Franz, a resident of Whatcom County, has standing to raise her claims and
23 bring this petition for review. RCW 36.70A.

24 E. The ordinance development and review process for No. 2005-024 is compliant with
25 directives in Chapter 36.70A.050, .060, .070(1) and (5)[a][c] and WAC 365-190-170. The
26 process incorporates local measures and criteria, exercising local options in resource lands
27 designation and management appropriately, according to the County's compliant 1997
28 comprehensive plan criteria.
29

30 F. The ordinance development and review process for No. 2005-024 was consultative,
31 drawing significantly on guidance and directives in Part Seven of WAC 365-195, and is
32 compliant with the Chapter 36.70A RCW.

1 **G.** The designated local official's Declaration of Nonsignificance, under terms of the
2 State Environmental Policy Act, and its integrated use with comprehensive plan
3 development and update, development regulations and zoning designations was in
4 accordance with the Whatcom County Code (WCC 20.10), WAC 365-195-760, Chapter
5 36.70A RCW and Chapter 43.21c RCW.
6

7 **H.** The ordinance development and review process for No. 2005-003, the North Star
8 MRL designation, is compliant with the County's 1997 comprehensive plan criteria, the
9 implementation of SEPA, and does not interfere with fulfillment of GMA goal 8. RCW
10 36.70A.020(8).

11 **I.** The ordinance development and review process for No. 2005-024 and No. 2005-003
12 in its public participation elements is compliant with RCW 36.70A.035 and RCW 36.70A.140
13 and the Whatcom County Code at 20.10.
14

15 **J.** The two ordinance amendments to the Whatcom County Comprehensive Plan
16 (adopted Mineral Resource Lands Designation and Criteria and the North Star MRL
17 designation) are internally consistent with these comprehensive plan policies and goals:
18 Goal 8J, particularly Policy 8J(1); Goal 8K, particularly Policies 8K(1) and 3; Goal 8L,
19 particularly Policies 8L(1), (2), and (4); and Goal 8P, particularly Policies 8P(1), (4), and (5),
20 and, therefore, with RCW 36.70A.070.
21

22 **K.** The amendments to the Comprehensive Plan of Whatcom County, as adopted in
23 Ordinances No. 2005-024 and No. 2005-003, are compliant with Chapter 36.70A RCW. No
24 declaration of invalidity is required.

25 **L.** Any Conclusion of Law hereafter deemed to be a Finding of Fact is hereby adopted
26 as such.
27

28 **ORDER**

29 These challenges to the Whatcom County Comprehensive Plan, its policies and goals, and
30 its mineral resource lands designations and criteria do not prevail. This Board, having
31 determined that Ordinances 2005-024 and 2005-003 amending the Whatcom County
32

1 Comprehensive Plan are in compliance with the Growth Management Act (Ch. 36.70A
2 RCW) as to all the challenges raised in the petition, this case is hereby DISMISSED.
3
4

5
6 Pursuant to RCW 36.70A.300 this is a final order of the Board.

7 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
8 of mailing of this Order to file a motion for reconsideration. The original and three
9 copies of a motion for reconsideration, together with any argument in support
10 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
11 original and three copies of the motion for reconsideration directly to the Board, with
12 a copy to all other parties of record. **Filing means actual receipt of the document at**
13 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of
14 a motion for reconsideration is not a prerequisite for filing a petition for judicial
15 review.

16 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
17 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
18 judicial review may be instituted by filing a petition in superior court according to the
19 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
20 Enforcement. The petition for judicial review of this Order shall be filed with the
21 appropriate court and served on the Board, the Office of the Attorney General, and all
22 parties within thirty days after service of the final order, as provided in RCW
23 34.05.542. Service on the Board may be accomplished in person or by mail, but
24 service on the Board means **actual receipt of the document at the Board office** within
25 thirty days after service of the final order. A petition for judicial review may not be
26 served on the Board by fax or by electronic mail.

27 **Service.** This Order was served on you the day it was deposited in the United States
28 mail. RCW 34.05.010(19)

29 Done this 19th Day of September 2005.
30
31
32

Gayle Rothrock, Board Member

1 Hite, concurring in result:

2 Before beginning an analysis of the arguments presented on the issues before the Board, it
3 is important to be clear about the scope of the Board's review here. A basic requirement of
4 the GMA constrains the scope of board review in this case. This is the requirement that a
5 challenge to an enactment must be brought within 60 days of the date of publication of its
6 adoption. RCW 36.70A.290(2). This requirement applies to, among others, comprehensive
7 plan provisions that establish the criteria under which future comprehensive plan
8 amendments will be considered. As to the North Star designation, these are the 1997
9 designation criteria under which the North Star MRL designation was adopted. Despite
10 Petitioner's exhaustive presentation on many issues related to the compliance of the North
11 Star MRL with the GMA, this principle limits the challenges that she can bring to that MRL.
12
13

14 **I. CHALLENGES TO THE MRL DESIGNATION**

15 **A. Compliance of the 1997 Designation Criteria with the GMA**

16
17 Issues 1-5 challenge the compliance of the North Star MRL with substantive provisions of
18 the GMA. Petitioner timely appealed the ordinance adopting the North Star MRL
19 designation but she did not (nor could she in 2005) appeal the 1997 comprehensive plan
20 designation criteria that allowed the MRL designation. Petition for Review, March 25, 2005,
21 at 1; see also Revised Issues Statement, April 28, 2005, I.1.a and c. However, the MRL
22 designation was processed pursuant to the County's *existing* (1997) comprehensive plan
23 designation criteria. Ordinance 2005-003, Findings of Fact.² That is, the designation
24 criteria that were applied to determine whether to grant the MRL were not those adopted in
25 the 2004 update but those that had been adopted as part of the 1997 comprehensive plan.
26
27
28
29
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31
32 ² The North Star MRL application was submitted well in advance of the adoption of updates to the MRL
designation criteria in Ordinance 2005-024. See the Staff Report dated June 2, 2004. Exhibit 27.

1 Ex. 27.³ Because the 1997 designation criteria are not now subject to challenge, Petitioner
2 is barred from arguing that those criteria fail to comply with substantive provisions of the
3 GMA. Intervenor notes that the 1997 designation criteria are in compliance with the GMA
4 and reminds the Board that the North Star MRL was approved pursuant to those criteria,
5 rather than the newly adopted 2004 MRL designation criteria:
6

7 While we recognize that the Petitioner is challenging the modifications to the criteria,
8 it must be recognized that the 2005 criteria were not applied to the North Star MRL.
9 Therefore, the Petitioner's attempts to analyze the North Star MRL under the new
10 criteria should be ignored.

11 Brief of Intervenor at 15:

12 The 1997 designation criteria must be deemed to be compliant with the GMA and with the
13 related administrative regulations in Ch. 365-190 WAC and Ch. 365-195 WAC because any
14 challenge to them now would not be timely.⁴ RCW 36.70A.290(2). The substantive
15 requirements of the GMA with which the 1997 designation criteria for MRLs are deemed
16 compliant include the requirements for rural lands (Issue No. 1); the goal to protect private
17 property rights (RCW 36.70A.020(6)) (Issue No. 2); protection of water and critical areas
18 (Issue No. 3)⁵; goals and requirements for natural resource areas (Issue No. 4); and
19 compliance with the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and
20 Critical Areas (Ch. 365-190 WAC) (Issue No. 5). While there may be a basis for challenging
21 the MRL designation's compliance with the GMA provisions listed in Issues 1-5, such a
22 basis would be extremely limited. The 1997 designation criteria must be read in light of the
23 GMA provisions that governed their adoption in the first place, and, where the
24 comprehensive plan and development regulations do not expressly allow an action, the
25
26
27

28
29 ³ The Petition for Review in this case challenges Ordinance 2005-003 creating the North Star Mineral
30 Resource Land (MRL) designation, and Ordinance 2005-024, updating the mineral resources element of the
31 Whatcom County Comprehensive Plan pursuant to RCW 36.70A.131.

32 ⁴ As Intervenor points out, the mineral element of the plan was upheld by this Board in *Wells v. Whatcom
County*, WWGMHB Case No. 97-2-0030c (Final Decision and Order, January 16, 1998). Brief of Intervenor at
13.

⁵ Petitioner did not actually allege noncompliance with any statutory requirement for the protection of critical
areas since none of the cited statutory provisions requires protection of critical areas.

1 GMA provisions apply. With those caveats, though, an MRL that was adopted consistent
2 with the County's 1997 designation criteria is compliant with the GMA.

3
4 Since the North Star MRL was adopted pursuant to existing comprehensive plan policies
5 and development regulations, the chief basis for board review of the MRL is the consistency
6 of the MRL with those county policies and regulations. Petitioner fails to demonstrate that
7 some aspect of the North Star MRL falls outside the scope of the County's application of the
8 1997 designation criteria, and therefore I would find that she has failed to meet her burden
9 of proof with respect to Issues 1-5.
10

11
12 **B. Consistency of the North Star MRL with the 1997 Mineral Resource Lands**
13 **Designation Criteria**
14

15 Intervenor argues that "[I]t cannot be disputed that the North Star designation complies with
16 the necessary criteria." Intervenor's Response at 30. Petitioner's arguments are primarily
17 challenges to the compliance of the designation criteria with the GMA. See Petitioner's
18 Opening Brief and Reply Brief of Petitioner. It is difficult to discern Petitioner's arguments
19 concerning the consistency of the North Star MRL with the designation criteria because
20 those arguments are interspersed with her arguments on other points in extremely lengthy
21 briefs. Petitioner's Opening Brief is 116 pages without exhibits; Petitioner's reply brief is 51
22 pages without exhibits. However, it appears that she challenges the consistency of the
23 North Star MRL with at least one 1997 designation criterion: Criterion 2 requires a minimum
24 MRL designation size of twenty acres. General Criteria 2, Mineral Resource – Designation
25 Criteria, Chapter 8, p. 17, Ordinance 2005-024 (with changes made in 2005 marked).
26 Petitioner argues: "Whatcom limits density in MRLs to one unit per twenty acres, yet the
27 North Star MRL has one unit per 12.01 acres." Petitioner's Opening Brief at 25.
28
29

30
31 As Intervenor points out, the designation criterion does not apply to lot size. It requires that
32 the land designated with an MRL be at least twenty acres in size. Intervenor's Response

1 Brief at 18. The North Star MRL designation site is 37 acres. Finding of Fact 9, Ordinance
2 2005-003. It is therefore consistent with General Criterion 2. I would find that the North Star
3 MRL designation is consistent with the 1997 designation criteria.
4

5 **C. Procedural Challenges to the North Star MRL**

6

7 While the 1997 designation criteria must be deemed compliant with the GMA, the adoption
8 of a plan amendment pursuant to those designation criteria must still meet the procedural
9 requirements of the GMA. The allegations in Issue No. 6 primarily address procedural
10 questions. These include a variety of claims: failure to comply with the public notice and
11 participation requirements of the GMA; denial of due process to citizens in the SEPA
12 determination; failure to consider alternatives; failure to protect citizens' health, welfare and
13 well being; and failure to seek assistance from government agencies. Petitioner's Opening
14 Brief at 68.
15

16
17 The Board does not have jurisdiction to decide constitutional claims such as the claim of
18 denial of due process in the SEPA determination. *Roth, et al. v. Lewis County*, WWGMB
19 Case No. 04-2-0014c (Order on Motions to Dismiss, September 10, 2004). Similarly, the
20 Board does not have general jurisdiction over claims outside the GMA, SEPA (State
21 Environmental Policy Act) or the Shoreline Management Act (SMA). *Ibid.* Thus, the claims
22 that the Board can consider here are those grounded in particular provisions of the GMA,
23 SEPA, or the SMA.
24

25
26 The statutory provisions cited by Petitioner are RCW 36.70A.035(1)(a) and (c), (2)(a), and
27 36.70A.140. These statutory provisions apply only to the public participation and notice
28 claims. The cited administrative regulations, WAC 365-195-600(2)(a)(iii), (iv), (vii), (xi), (xii),
29 and (2)(b), 365-195-610, 365-105-730(2)(a), (b), and (c), WAC 365-195-900(2), are part of
30 the Procedural Criteria for Adopting Comprehensive Plans and Development Regulations
31 (Ch. 365-195 WAC), which are guidance rather than mandatory requirements:
32

1 This chapter makes recommendations for meeting the requirements of the act. The
2 recommendations set forth are intended as a listing of possible choices, but compliance
3 with the requirements of the act can be achieved without using all of the suggestions
4 made here or by adopting other approaches.
5 WAC 365-195-030(1).

6 Compliance with the Procedural Criteria cannot be the sole basis for a claim of
7 noncompliance; they may be considered but in the light of a statutory requirement.
8 Therefore, the only issues to be considered by the Board in Issue 6 are those challenging
9 public participation and notice.

10
11 The County's public participation procedures with respect to the determination of non-
12 significance (DNS) for the North Star MRL are fully set out in the main decision in the
13 discussion of Issue 5. The County's public participation procedures for the approval of the
14 North Star MRL pursuant to the 1997 designation criteria are referenced in the discussion of
15 Issue 6 in the main decision. I concur that these show that the County complied with RCW
16 36.70A.035 and 36.70A.140 in processing the North Star MRL.

17 18 19 20 **II. CHALLENGES TO THE 2004 MINERAL RESOURCE ELEMENT UPDATE** 21 **(ORDINANCE 2005-024)**

22 The Issue 8 claims are addressed to Ordinance 2005-024, the County's update of its
23 mineral resource lands element. (Issue 7 seeks a determination of invalidity, both as to the
24 2004 updated mineral resource land designation criteria and as to the North Star MRL.
25 However, invalidity may not even be considered unless there first is a finding of
26 noncompliance. RCW 36.70A.302(1)(a). Unlike the challenges to the MRL adopted
27 pursuant to the 1997 designation criteria, the challenges to the designation criteria adopted
28 in the 2004 update are timely. Ordinance 2005-024 was adopted pursuant to RCW
29 36.70A.131, which requires the County to review its mineral resource lands designations as
30 part of its RCW 36.70A.130(1) update:
31
32

1 As part of the review required by RCW 36.70A.130(1), a county or city shall review its
2 mineral resource lands designations adopted pursuant to RCW 36.70A.170 and
3 mineral resource lands development regulations adopted pursuant to RCW
4 36.70A.040 and 36.70A.060. In its review, the county or city shall take into
consideration:

- 5 1. New information made available since the adoption or last review of its
6 designations or development regulations, including data available from the
7 department of natural resources relating to mineral resource deposits; and
- 8 2. New or modified model development regulations for mineral resource lands
9 prepared by the department of natural resources, the department of
community, trade, and economic development, or the Washington state
association of counties.

10 RCW 36.70A.131.

11
12 These challenges may properly reach all matters related to the updated mineral lands
13 element that were raised by the Petitioner in her participation before the County's decision-
14 makers. RCW 36.70A.280(4).

15
16 Issue 8 alleges that the Mineral Resource Lands Designation Criteria violate comprehensive
17 plan goals: Goal 8J, particularly 8J(1), Goal 8K, particularly at 8K(1) and (3), Goal 8L,
18 particularly at 8L(1), (2) and (4), and Goal 8P, particularly at 8P(1), (4), and (5)

19
20 In her opening brief, Petitioner also argues that the mineral resource lands designation
21 criteria fail to comply with the same GMA requirements that she argued applied to the North
22 Star MRL in Issues 1-5. Petitioner's Opening Brief at 82. The failures to comply with the
23 GMA are alleged as: failing to protect property rights; using ad-hoc spot zoning; establishing
24 mineral resource lands of long-term significance; [failing to] protect the public; [failing to]
25 protect water resources of the public, maintain the GMA rural element requirements;
26 designating mineral resource lands after rural development has taken place; developing a
27 mineral resource plan that results in unconstitutional takings of private property; developing
28 a plan with internal inconsistency; allowing mine expansion in inappropriate areas for
29 unproven resources. Ibid.

1 The County's mineral resource plan is based in clearly articulated local circumstances. The
2 first circumstance is that there is a deficit between what existing MRLs can generate in
3 terms of commercially significant construction aggregate and the needs for a 50-year
4 supply. Brief of Respondent at 6; Exhibit 148. The second, a key determination by the
5 Surface Mining Advisory Committee, is that the deficit could not be met by designating all of
6 the additional potential resource areas outside of the Agricultural zoning district. Ibid.
7

8
9 In adopting MRL designation criterion 12, the County made an express policy decision to
10 protect prime agricultural soils from use for mining purposes:

11 Prohibit MRL designations in areas designated Agriculture by the Whatcom County
12 Comprehensive Plan that contain "Prime Farmland Soils" as listed in Table 5, Soil
13 Survey of Whatcom County Area, Washington, U.S. Department of Agriculture Soil
14 Conservation Service. Al Goldin (1983).

15 Additional Criteria for Designated Agricultural Areas, 12, Chapter Eight – Resource Lands,
16 Whatcom County Comprehensive Plan, Ordinance 2005-0023.

17 This has meant that the County had to turn to lands now designated as rural as the source
18 of the mineral resources required to be conserved under the GMA. Importantly, Petitioner
19 does not challenge the policy to exempt agricultural resource lands from MRL designation.
20 Given the unchallenged choice to protect agricultural lands from a change in designation to
21 mineral resource lands, the County has few alternatives but to rely upon rural lands for MRL
22 designation changes. The updated designation criteria and the mining permit application
23 procedures represent the balance that the County has struck between conserving mineral
24 resources, protecting agricultural resource lands, and mitigating the effects of mineral
25 resource extraction upon nearby residents.
26

27
28 Petitioner alleges that the updated designation criteria are inconsistent with certain plan
29 provisions. Inconsistency under the Act means that it is impossible to carry out one
30 provision of a plan and also carry out the other. *Camp Nooksack Association v. City of*
31 *Nooksack*, WWGMHB Case No. 03-2-0002 (Final Decision and Order, July 11, 2003). I
32 would not find that the cited comprehensive plan policies are inconsistent with the new

1 designation criteria but that they have been balanced with the weight in favor of
2 conservation of agricultural lands. Petitioner's own situation demonstrates that this balance
3 is not perfect. However, I would find that it is within the range of discretion afforded to the
4 County.
5
6
7

8 **III. CONCLUSION**

9 For these reasons, I concur in the result reached in the main decision.
10

11 Dated this 19th day of September 2005.
12
13

14 _____
15 Margery Hite
16 Board Member
17

18 I concur in the conclusion in the main decision that the Petitioner has not carried her burden
19 of proof pursuant to RCW 36.70A.320 (2) for the issues raised in the petition, that the
20 County is in compliance with the GMA on these issues, and that the case should be
21 dismissed. I concur in Board Member Hite's analysis of the issues.
22
23

24 Dated this 19th day of September 2005.
25
26

27 _____
28 Holly Gadbaw
29 Board Member
30
31
32